KENTUCKY BANK TAX CASES.

There were twenty-six of these cases in all. Of these, five were decided on the 3d of April, 1899, and are reported in volume 173, U. S. Reports, viz.: CITIZENS' SAVINGS BANK OF OWENSBORO *v.* OWENSBORO, at page 636; DEPOSIT BANK OF OWENSBORO *v.* OWENSBORO, at page 662; DEPOSIT BANK OF OWENSBORO *v.* DAVIESS COUNTY, at page 663; FARMERS' AND TRADERS' BANK OF OWENSBORO *v.* OWENSBORO, at page 663; OWENSBORO NATIONAL BANK *v.* OWENSBORO, at page 664; five were affirmed May 15, 1899, by a divided court, viz.: No. 356, STONE *v.* BANK OF KENTUCKY; No. 357, LOUISVILLE *v.* BANK OF KENTUCKY; No. 360, STONE *v.* LOUISVILLE BANKING COMPANY; No. 361, LOUISVILLE *v.* LOUISVILLE BANKING COMPANY; No. 387,

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STONE *v.* DEPOSIT BANK OF FRANKFORT, all argued February 28 and March 2, 1899, and the others are reported below.

STONE, Auditor, *v.* FARMERS' BANK OF KENTUCKY.

FARMERS' BANK OF KENTUCKY *v.* STONE, Auditor.

Nos. 885, 886. Argued February 28, March 2, 1899. — Decided May 15, 1899.

The decree below, so far as it granted the relief prayed as against the defendants other than the city of Georgetown and the county of Scott, is affirmed by a divided court; and, so far as it adjudicated against the complainant and in favor of the defendants the city of Georgetown and the county of Scott, those defendants not having been parties or privies to the judgments pleaded as *res judicata*, is affirmed upon the authority of the decision in *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636.

THESE appeals were taken from a decree rendered in a suit in equity brought by the Farmers' Bank of Kentucky against Samuel H. Stone, auditor, Charles Findly, secretary of State, and G. W. Long, treasurer of the Commonwealth of Kentucky, constituting a state board of valuation and assessment; the board of councilmen of the city of Frankfort; the county of Franklin; the city of Henderson; the county of Henderson; the city of Georgetown; and the county of Scott. The object of the bill and of an amended and supplemental bill was to restrain the valuation of the franchise of the complainant under the provisions of a revenue act of Kentucky, enacted November 11, 1892, as also the certification of such valuation and the collection of taxes thereon for the years 1895, 1896, 1897 and 1898.

It was averred in the bill that the complainant was chartered on February 16, 1850, to endure until May 1, 1880; and that in and by the fifteenth section of the charter of complainant it was provided as follows:

"It shall be the duty of the cashier of the principal bank,

on the 1st day of July, 1851, and on the 1st day of July in each succeeding year during the continuance of this charter, to pay to the treasury of this Commonwealth fifty (50) cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full for all tax or bonus: *Provided*, That no tax shall be paid until said bank goes into operation: *And provided further*, That the tax or bonus hereby proposed to be imposed on each share of stock in this bank, or such as shall hereafter be imposed on each share, is hereby set apart and forever dedicated to the cause of education on the common school system; and that whenever the same, or any part thereof, shall be diverted otherwise by legislative enactment, said bank shall then be exonerated from the payment of any tax or bonus whatever."

It was further averred that on March 10, 1876, the charter of the bank was extended to May 1, 1905, by the following enactment:

"SEC. 1. That the charter of the Farmers' Bank of Kentucky as amended be extended for the period of twenty-five (25) years from the termination of its charter as therein fixed: *Provided*, That said charter and amendments shall be subject to amendment or repeal by the general assembly by general or special acts: *And provided further*, That whilst the privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

It was then averred that after the extension of the charter, in consequence of an attempt of the county of Franklin to collect a tax from the bank for county purposes, under the authority of an act of Kentucky passed in 1876, which statute, it was alleged by the bank, was in violation of the charter exemption of the bank, the complainant brought, and carried to a successful termination in 1888, in the Court of Appeals of Kentucky, a suit to enjoin the county named from collecting the taxes complained of. The judgment rendered was pleaded as *res judicata*.

The enactment, on May 17, 1886, of a law, commonly denominated as the Hewitt Act, relating to the taxation of

banks, was next stated in the bill. An acceptance of the terms of that act was averred, which it was claimed constituted an irrevocable contract with the complainant. It was next alleged that on November 11, 1892, the legislature of Kentucky passed a revenue act which subjected banks in the State to county and municipal taxation, and to a much greater rate of taxation than was provided in the Hewitt Act. Complainant then pleaded as *res judicata* judgments rendered in 1895 and 1896 in its favor by courts of the State of Kentucky, in suits brought by the bank to enjoin attempts to collect from it alleged franchise taxes under the supposed authority of the revenue act of 1892. The defendants, who were parties to the suits in question, were averred to be the county of Franklin and the sheriff of that county; the board of councilmen of the city of Frankfort; the city of Henderson; and the county of Henderson and its sheriff. The several decrees, it was alleged, conclusively established that the acceptance of the Hewitt Act constituted an irrevocable contract with the bank as respected taxation, and that the revenue act of 1892, in certain particulars, impaired such contract, and in so far as it did so was in violation of the Constitution of the United States and void.

Certain of the defendants filed pleas to the jurisdiction. All the defendants demurred to the bill, and some filed answers, to which plaintiff filed replications. The demurrers and pleas were overruled, and the cause was heard upon the pleadings and attached exhibits. On January 21, 1898, a final decree was entered sustaining the claims of *res judicata* made in the bill, and granting the relief prayed for so far as respected the assessment, certification and collection of franchise taxes for the benefit of the defendants the board of councilmen of the city of Frankfort, the county of Franklin, the city of Henderson and the county of Henderson. It was held, that by the judgments relied upon by complainant, it had been conclusively adjudicated as to those defendants that the Hewitt Act constituted an irrepealable contract, and that the provisions of the revenue act of 1892 in conflict with that act impaired the terms of such contract, and were void.

(88 Fed. Rep. 987.) The decree adjudged that as to the defendants the county of Scott and the city of Georgetown, who were found not to have been either parties or privies to the records and decrees constituting *res judicata*, that no irrevocable contract had been established, by judgment or otherwise, and as to those defendants the bill was therefore dismissed. From the decree thus entered both parties appealed to this court.

Mr. Ira Julian for Georgetown and Scott County. *Mr. Henry L. Stone* for Louisville.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the banks.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The decree below, so far as it granted the relief prayed as against the defendants other than the city of Georgetown and the county of Scott, is affirmed by a divided court. The decree, so far as it adjudicated against the complainant and in favor of the defendants the city of Georgetown and the county of Scott, those defendants not having been parties or privies to the judgments pleaded as *res judicata*, must be affirmed upon the authority of the decision in *Citizens' Savings Bank of Owensboro* v. *City of Owensboro and A. M. C. Simmons, Tax Collector*, 173 U. S. 636.

And it is so ordered.

STONE *v.* BANK OF COMMERCE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

No. 362. Argued February 28, March 2, 1899. — Decided May 15, 1899.

Citizens' Savings Bank v. *Owensboro*, 173 U. S. 636, followed to the point that in the case of a bank whose charter was granted subsequently to the year 1856, and which had accepted the provisions of the Hewitt Act,

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and had thereafter paid the tax specified therein, there was no irrepealable contract in favor of such bank that it should be thereafter and during its corporate existence taxed under the provisions of that act.

The agreement set forth in the statement of facts between the city of Louisville, the sinking fund commissioners of that city, represented by the city attorney, and the various banks of that city acting by their attorneys, was not a valid agreement, within the power of an attorney at law to make.

An attorney, in his capacity merely as such, has no power to make any agreement for his client before a suit has been commenced, or before he has been retained to commence one; and if, under such circumstances, he assumes to act for his principal, it must be as agent, and his actual authority must appear.

An equitable estoppel which would prevent the State from exercising its power to alter the rate of taxation in this case should be based upon the clearest equity; and the payment of the money under the circumstances of this case, not exceeding the amount really legally due for taxes, although disputed at the time, does not work such an equitable estoppel as to prevent the assertion of the otherwise legal rights of the city.

THE bill in this case was filed in 1897 by the Bank of Commerce, a citizen and resident of the city of Louisville in the State of Kentucky, for the purpose of obtaining an injunction restraining the defendants from assessing the complainant and from collecting or attempting to collect any taxes based upon the assessment spoken of in the bill, and for a final decree establishing the contract right of the complainant to be taxed in the method prescribed by the act of May 17, 1886, known as the Hewitt Act, the terms of which it alleged it had accepted. The bill sought to perpetually enjoin the defendants from assessing the franchise or property of the complainant in any other manner than under that act. The material provisions of the Hewitt Act are set out in the opinion of the court, delivered by Mr. Justice White, in the case of the *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636.

In 1891 Kentucky adopted a new constitution, section 174 of which, providing for the taxation of all property in proportion to its value, is also set forth in the above-cited case.

The legislature of the State in 1892 passed an act in relation to the taxation of banks and other corporations which was in conflict with the Hewitt Act, and provided for taxing the

banks in a different manner from that act, and also subjected the banks to local taxation, the total being much more onerous than that enforced under the Hewitt Act.

The complainant was incorporated under an act of the legislature of Kentucky approved February 10, 1865, and it had all the powers granted by that act and the several amendments thereof as alleged in its bill.

There were various other banks in the city of Louisville which also alleged that they had accepted the terms of the Hewitt Act, and by reason thereof had a valid contract with the State that they should be taxed only under the provisions of that act.

The complainant alleges in its bill that early in the year 1894 a demand was made on the part of the defendant the city of Louisville, based upon the act of 1892 and the ordinance adopted in pursuance thereof, for the payment of a license tax equal to four per cent of its gross receipts into the sinking fund of the city. The banks denied their liability to pay any tax other than that provided in the Hewitt Act, and hence arose the differences between the city and the banks.

No litigation had been commenced for the purpose of testing the questions at issue between the city and the banks, although negotiations looking to that end had been in progress between the city attorney of Louisville and the members of the sinking fund board, on the one hand, and the counsel for the various banks and trust companies on the other. There is set forth in the bill of the complainant the action of the sinking fund board as follows:

"SINKING FUND OFFICE, *Feb'y* 13, 1894.

"A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, appeared before the board on behalf of the banks who are members of the Louisville clearing house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but, in order to save the sinking fund

from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

"After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust and title companies who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

"First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for state taxes and the amount they would be required to pay for state taxes under the provisions of what is known as the 'Hewitt bill.' This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner or to any extent prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

"Second. In addition to making the above payments the said banks and companies, save those selected to test the question involved, shall each lend to the sinking fund a sum which, added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same, with interest at four per centum per annum, when and if it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee, and the obligation to repay the same shall be void.

"Third. The banks or companies selected to test the question involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and

will receive therefor the obligations of the sinking fund as above described.

"Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

"A true copy. Attest: J. M. Terry,
Secretary and Treasurer."

Following the above, the complainant's bill contains what is termed a "Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust and title companies of the city of Louisville," which stipulation reads as follows:

"It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

"First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, and their counsel, to wit, Messrs. Humphrey & Davie and Helm & Bruce, that the question of liability of said banks and trust and title companies to pay municipal taxes, either license or *ad valorem*, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

"Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

"A. Banks whose charters had been granted prior to 1856.

"B. Banks whose charters had been granted subsequent to 1856.

"C. National banks.

"It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

"Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky representing class A, the Louisville Banking Company representing class B, and the Third National Bank representing class C, and these banks respectively applied for a writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

"It was distinctly understood and agreed at the time, and this agreement was made for the best interests of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes; and it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

"Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners of February 13, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further

reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation, until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For Banks, Trust and Title Companies of the City of Louisville.

H. S. BARKER, *City Att'y.*

Approved: C. H. GIBSON,
Pres't Com'rs Sinking Fund City of Lou.

A true copy. Attest: HUSTON QUINN.
ARTHUR PETER.
M. MCLOUGHLIN."

The Louisville Banking Company was one of the banks which brought an action for the purpose of testing the question of its liability to taxation. The charter of that company was granted subsequent to the year 1856, and, in that respect, it was like the defendant bank. It also claimed to have accepted the provisions of the Hewitt Act. In the litigation which followed, the Louisville Banking Company was adjudged by the Court of Appeals of Kentucky to have an irrepealable contract throughout its charter existence to be taxed under the Hewitt Act, and judgment pursuant to that adjudication was entered in favor of that company. The complainant herein claimed the benefit of the foregoing adjudication, and the Circuit Court allowed it, and gave judgment as follows:

"1. That the complainant is entitled to the benefit of the proceedings taken in the case of the *Louisville Banking Company* v. *R. H. Thompson, Judge, etc.*, in the Jefferson court of common pleas, and the proceedings taken in said cause on appeal to the Court of Appeals of Kentucky, wherein the Louisville Banking Company was appellant and the said R. H. Thompson, Judge, etc., and the city of Louisville were appellees, to the same extent as if the complainant had been a party to said proceedings.

"2. That it is *res judicata* between the complainant and the city of Louisville that the complainant is entitled to be taxed under what is known as the Hewitt revenue law and not otherwise, and it is therefore adjudged, ordered and decreed that the defendants Samuel H. Stone, Charles Findley and George W. Long are perpetually enjoined and restrained from making any assessment under the act of November 11, 1892, or certifying the same to the city of Louisville upon any rights, properties or franchises, or shares of stock of the complainant, and that any provisions of the constitution of the State of Kentucky and any provision of the said act of November 11, 1892, or of the city charter which may be construed as authorizing the levy or assessment of any tax against the complainant, its rights, properties or franchises, other than as allowed by the said Hewitt law is, during the corporate existence of the complainant, unconstitutional and void, and that the complainant and its shares of stock are exempt from all other taxation whatsoever, except as prescribed in the said Hewitt law, so long as said tax shall be paid during the corporate existence of complainant."

The defendants appealed directly to this court from the judgment of the Circuit Court, under the provisions of section 5 of the act of March 3, 1891, c. 517, 26 Stat. 826, because the case involved the application of the Constitution of the United States, and because a law of the State of Kentucky was claimed to be in contravention of that Constitution.

Mr. Henry L. Stone for Louisville. *The Attorney General of Kentucky* filed a brief for Stone.

Mr. Alexander Pope Humphrey, Mr. Frank Chinn, Mr. James P. Helm and *Mr. John W. Rodman* for the banks.

Mr. Justice Peckham, after stating the facts, delivered the opinion of the court.

We have already decided, in *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636, that in the case of a bank whose charter was granted subsequently to the

year 1856, and which had accepted the provisions of the Hewitt Act, and had thereafter paid the tax specified therein, there was nevertheless no irrepealable contract in favor of such bank that it should be thereafter and during its corporate existence taxed under the provisions of that act. And in the same case we held that the bank was properly taxed under the act of the legislature of Kentucky passed in 1892. Unless the complainant is right in its contention that it is a privy to the judgment in the case of the Louisville Banking Company, (mentioned in the foregoing statement,) and that the question is *res judicata* in its favor, the complainant has failed to make good its claim to be exempted from the provisions for its taxation under the act of 1892. The Circuit Court has held that the complainant was entitled to be regarded as privy to the judgment above mentioned in favor of the Louisville Banking Company, 88 Fed. Rep. 398, and that it could therefore avail itself of the judgment in that case as *res judicata*.

The sole question to be determined in this case is as to the validity and effect of the agreement above set forth. The complainant herein was not in fact a party to the judgment in the *Louisville Banking Company case*, and it can only obtain the benefit of that judgment by virtue of the agreement.

The commissioners of the sinking fund form a separate and distinct corporation from the city of Louisville, and no right is shown to sign or make the agreement for itself or to bind the city thereby. The agreement is not signed by the mayor, nor is it pretended that there was any action on the part of the general council of the city authorizing the making of the agreement. It was signed by the city attorney, and if he had no power to sign on behalf of the city there is nothing to create any liability on its part by virtue of the agreement, unless the payment of the money therein spoken of operates by way of estoppel to prevent the city from setting up the invalidity of such agreement. The effect of the payment of the money will be adverted to hereafter.

Upon its face there is no agreement even formally made between the city of Louisville and the banks of which the complainant herein is one, unless the signature of the city

attorney makes a valid agreement for the city. When the agreement was made no suit had been commenced by any of the parties; no litigation in regard to matters in dispute was pending. Prior to the making of the agreement it was a question altogether in the future as to what means should be adopted, and what suits commenced, for the purpose of establishing the rights of the various parties, as claimed by them. The question as to what course should be pursued was not one of law only. It was also one of policy. The stipulation actually entered into was of an administrative as well as of a legal nature, involving the administration of the law regarding taxation and the best means of determining the legal questions involved in the dispute, while at the same time obtaining, so far as possible, payment of the taxes claimed by the commissioners of the sinking fund as due from the various banks and trust companies. These were questions which an attorney would have no power to decide, and concerning which he would have no power to make any agreement.

An attorney, in his capacity merely as such, has no power to make any agreement for his client before a suit has been commenced or before he has been retained to commence one. Before the commencement of a suit, or the giving of authority to commence one, there is nothing upon which the authority of an attorney to act for his client can be based. If before the commencement of any suit an attorney assumes to act for his principal it must be as agent and his actual authority must appear, and if it be not shown it cannot be inferred by comparison with what his authority to act would have been if a suit were actually pending and he had in fact been retained as attorney by one of the parties. The authority of an attorney commences with his retainer. He cannot while acting generally as an attorney for an estate or a corporation accept service of process which commences the action without any authority so to do from his principal. This was directly decided in *Starr* v. *Hall*, 87 N. C. 381, and *Reed* v. *Reed*, 19 S. C. 548, so far as regards a personal defendant, but the same rule would follow in case of a corporation unless authority to appear were specially given.

When an attorney has been retained he has certain implied powers to act for his client, in a suit actually commenced, in the due and orderly conduct of the case through the courts. In cases of suits actually pending he may agree that one suit shall abide the event of another suit involving the same question, and his client will be bound by this agreement. *Ohlquest* v. *Farwell*, 71 Iowa, 231; *North Missouri Railroad Company* v. *Stephens*, 36 Missouri, 150; *Eidam* v. *Finnegan*, 48 Minnesota, 53; *Gilmore* v. *American Central Insurance Company*, 67 California, 366; 1 Lawson's Rights, Rem. & Pr., section 173, page 292; 1 Thompson on Trials, section 195.

One case has gone to the extent of holding the attorney's authority to agree that the case of his client should abide that of another, included his right to agree that the case should abide that of another involving the same question, although his client was not a party to that case and had no power to interfere in its prosecution or defence. *Scarritt Furniture Company* v. *Moser*, 48 Mo. App. 543, 548.

There might perhaps be some doubt about the correctness of a decision which so extended the power of the attorney. It would be carrying the authority of an attorney a good way to thus hold. It is not, however, in the least necessary for us to decide the question in this case.

All the above cases relate to the authority of the attorney after the actual commencement of suit and after the jurisdiction of the court has attached and the agreements made were in the discharge of the duties owing as between attorney and client, and subject to the supervision and power of the court itself.

Nothing of the kind exists in the agreement here in question. It is more than a mere agreement of an attorney to abide the event of a decision in an actually existing suit. This agreement was not in the execution of the general power of an attorney to decide upon the proper conduct of a suit then on its way through the courts. It was an agreement much more than that, and of a different nature. As we have said, the question to be determined was one of policy as well as of law; eminently one for the consideration of the city authorities, its

mayor and its general council, aided and assisted by the advice of the attorney of the city. But it was a decision of a corporate nature, and not one to be decided by any but the corporation, and it was one which we think was beyond the power of an attorney to make while acting merely in his capacity as attorney before suit brought and without specific authority.

We are also of opinion that as city attorney he had no greater power to bind the city by that agreement than would an attorney have in the case of an individual. The power of an attorney to conduct an actually existing suit, and in its proper conduct to agree to certain modes or conditions of trial, cannot be enlarged by implication, so as to embrace a power on the part of an attorney, before litigation is existing and before he has been retained to conduct it, to enter into an agreement of the nature of this one. It might be convenient to have such power and the commencement of a suit and a retainer to defend may be a mere technicality, but the power of an attorney depends upon the authority given him to commence a suit or to defend a suit actually brought, and he has no power as an attorney until such fact exists.

Section 2909, Revised Statutes of Kentucky, provides that —

"There shall be elected by the general council, immediately upon the assembling of the new board, a city attorney, whose duty it shall be to give legal advice to the mayor and members, of the general council, and all other officers and boards of the city in the discharge of their official duties. If requested, he shall give his opinions in writing, and they shall be preserved for reference. It shall also be his duty to prosecute and defend all suits for and against the city, and to attend to such other legal business as may be prescribed by the general council."

We do not think this section gave him the power to bind the city by the agreement in question. He is undoubtedly the retained attorney of the city in every suit brought against it, and it would have been his duty to take charge of the litigation when it should arise between the banks and the commissioners of the sinking fund or the city of Louisville. That is, when the suit was commenced, the statute operated in place

of a retainer in case of a personal client. When suits were commenced against the city it was his duty to defend them, but he had no power to appear for the city as a defendant in a suit which had not been commenced or to accept service of process and waive its service upon the proper officer, without authority from that officer. Merely as city attorney, he had no larger powers to bind his clients before suit was commenced than he would have had in the case of an individual in like circumstances. There must be something in the statute providing for the election or appointment of an attorney for a corporation that would give such power; otherwise it does not exist. We find nothing of the kind in the statute cited. The Supreme Court of New York held, at special term, that the counsel to the corporation of the city of New York had no greater powers than an ordinary attorney to bind his client. *People* v. *Mayor &c. of New York*, 11 Abb. Pr. 66.

The agreement here in question, it is perceived, is much more extensive than a mere agreement to abide the event of another suit, and it is quite plain that it embraces more than the attorney had the right to bind the city to, even if an action had then been commenced and the agreement was made in that action. However imperative may have been his duty to save costs and expenses to the city, he was not authorized on that account to enter into agreements of the nature of this one, where no suits had been commenced against the city and the commencement of which he had no power to provide for.

Nor do we see that the commissioners of the sinking fund were granted any power to make the stipulation in question; certainly none to bind the city of Louisville. Our attention has not been drawn to any statute giving them power to make an agreement of this nature.

Parties dealing with a municipal corporation are bound to know the extent of the powers lawfully confided to the officers with whom they are dealing in behalf of such corporation, and they must guide their conduct accordingly. *Murphy* v. *Louisville*, 72 Kentucky, 189.

As a result, we think the stipulation was not a valid one,

binding either the commissioners of the sinking fund or the city of Louisville.

It is contended, however, on the part of the complainant that the payment of the money to the commissioners of the sinking fund, pursuant to the provisions of the stipulation, and its receipt by them, estops the city of Louisville from asserting the invalidity of the stipulation. The claim of complainant on this branch of the case is in substance that it has the right under the agreement to the benefit of the judgment in favor of the Louisville Banking Company as *res judicata* in its favor, because the city, having received the money by virtue of the agreement, is estopped by that fact from insisting upon its invalidity.

The money was paid to the commissioners of the sinking fund and not to the city, which is a separate and distinct corporation. No corporate act on the part of the city is shown since the payment which recognizes or approves it. There is no ratification by the city of Louisville of this unauthorized act of its attorney. In speaking of the act of the attorney as unauthorized we do not mean to reflect in the slightest degree unfavorably upon the conduct of the city attorney, which seems by this record to have been prompted solely by a regard for the best interests of the city and by the most scrupulous good faith. We speak only of the act as one for which the law would not hold the city answerable.

But let us look for a moment at the position occupied by the respective parties and the facts which surround this alleged estoppel upon the city, and for this purpose the invalidity of the agreement is assumed. The banks of which complainant was one, at the time this agreement was entered into, conceded that they were liable to the payment of taxes under the Hewitt Act, and denied that they were liable to pay taxes under the act of 1892. The city, on the contrary, asserted the right to tax under the act of 1892, and the question became one for judicial decision. The banks paid the moneys spoken of in the agreement, and proceedings were inaugurated to test the legal question involved in the dispute.

It is alleged on the part of the complainant that the taxes under the act of 1892 were and are greater in amount than under the Hewitt Act, and it is not alleged or contended that the amount of moneys paid by the various banks was any greater than would have been due and payable under the act of 1892. That is, the banks have in fact paid no more than they ought to have paid if they had complied with the provisions of the act of 1892. This court has just decided in the *Owensboro case* (above cited) that the claim, on the part of the banks, of an irrepealable contract under the Hewitt Act was not well founded, and that the banks (so far as concerns that contention) have been liable to pay taxes under the act of 1892 ever since that act was passed. The complainant now asserts that because the banks paid the money which they did under the agreement above mentioned, (although such money was certainly no more than they were legally bound to pay under the act of 1892,) therefore the city is estopped from setting up the invalidity of this agreement. The result would be that complainant by virtue of the judgment in the *Louisville Banking Company case* could only be taxed under the Hewitt Act for the remainder of its corporate existence, although the act of 1892 is a perfectly valid act under which, but for the judgment above mentioned, the complainant would be liable to much greater taxation than the Hewitt Act provides for. We think these facts form no basis for the equitable estoppel claimed by the complainant. The payment of money by complainant under the agreement, when it ought to have paid at least as large a sum under the act of 1892, but which it refused to pay under that act, because it denied the validity thereof, we think is not the basis for an appeal to the equitable powers of a court. As a result of the judicial inquiry, it is seen that the banks have been at all times liable to pay taxes under the act of 1892. The fact that they disputed this liability and paid the money under an agreement which did not admit the validity of the act of 1892, forms no basis for this equitable estoppel, when the fact appears that the moneys actually paid were certainly no more than the banks were liable to pay under

the disputed act. If, however, it were found that the banks had paid at any time an amount greater than they would have been liable to pay under the act of 1892, the city, by the passage of the ordinance approved August 6, 1895, provided a means for crediting any bank with the amount of such overpayment. In no way, therefore, has the complainant been legally damaged by the payment of the money to the sinking fund. The only thing that may be said is, that by virtue of the agreement, the complainant paid, and the sinking fund received, the money at the times mentioned, which otherwise would have been refused; but when we come to consider that, although the legal question was in dispute, the right was really with the city, and the banks were really liable to pay taxes under the act of 1892, we think the payment they then made under the agreement would form no equitable estoppel in favor of complainant. If so, it would thereby be enabled to secure for itself the benefit of the plea of *res judicata*, and would thus prevent the application of the act of 1892 to it during its corporate existence. This result would not, in our opinion, be an equitable one, and as complainant has not in reality suffered legal injury by the payment of the money, there is no basis for the support of an estoppel.

An equitable estoppel which is to prevent the State from receiving the benefit of an exercise of its power to alter the rule or rate of taxation for all the time of the existence of a business corporation, should be based upon the clearest equity. It is fitly denominated an equitable estoppel, because it rests upon the doctrine that it would be against the principles of equity and good conscience to permit the party against whom the estoppel is sought to avail himself of what might otherwise be his undisputed rights. The payment of money under the circumstances of this case, not exceeding the amount really legally due for taxes, although disputed at the time, does not seem to work such an equitable estoppel as to prevent the assertion of the otherwise legal rights of the city.

Nor does the fact that the complainant bank, upon the execution of the agreement, omitted to sue and obtain

judgment against the city, add any force to the claim of estoppel.

The complainant, it must be assumed, knew the invalidity of the agreement because of the lack of power on the part of those who signed it to bind the city or the sinking fund as a corporation. There was no dispute as to facts, and no misrepresentations were made. The law made the invalidity. Knowing the agreement to be invalid, the omission to sue forms no ground upon which to base the estoppel. The complainant had no valid agreement upon which to stand, and if it omitted to sue it was at its own risk. There would seem to be no reason of an equitable nature springing out of the facts herein why the complainant should not hereafter be bound to pay the taxes prescribed in the act of 1892.

We think the judgment of the Circuit Court should be reversed and the case remanded with instructions to dismiss the bill, and it is so ordered.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissented.

No. 363. LOUISVILLE *v.* THE BANK OF COMMERCE. Appeal from the Circuit Court of the United States for the District of Kentucky. MR. JUSTICE PECKHAM. In the above case the same question is involved that has just been determined in No. 362, and there will be a like order reversing the judgment and remanding the case to the Circuit Court with directions to dismiss the bill.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissented.

FIDELITY TRUST AND SAFETY VAULT COMPANY *v.* LOUISVILLE.

SAME *v.* STONE, Auditor.

LOUISVILLE TRUST COMPANY *v.* LOUISVILLE.

SAME *v.* STONE, Auditor.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Nos. 406, 407, 408, 409. Argued February 28, March 2, 1899. — Decided May 15, 1899.

On the authority of *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636, and *Stone* v. *Bank of Commerce*, *ante*, 412, the decrees below are affirmed.

In these cases the respective trust companies who are appellants, all four being Kentucky corporations chartered subsequent to the year 1856, filed their respective bills to enjoin the assessment and collection of certain taxes. The want of power to assess and collect the taxes complained of was in each bill made to depend upon two substantially identical grounds, which were briefly these:

First. That a legislative act of the State of Kentucky, passed in 1886, and designated as the Hewitt Act, had created an irrevocable contract between the State and the complainants, from which it arose that the taxes sought to be enjoined could not be assessed and collected without violating the clause of the Constitution of the United States forbidding impairment by a State of the obligations of a contract.

Second. That in a suit previously brought by the Louisville Banking Company, a Kentucky corporation, it had been finally decided by the Court of Appeals of the State of Kentucky that the act in question (the Hewitt Act) had created in favor of the corporations accepting its provisions an irrevocable contract, which could not be impaired without violating the Constitution of the United States. It was averred in each of

Counsel for Louisville.

the bills that, although the complainants were not parties to the suit brought by the Louisville Banking Company, they were each, nevertheless, privies to the record and decree rendered therein, because of a certain agreement, which, it was averred, had been entered into between the complainants, the commissioners of the sinking fund and the city of Louisville, through the city attorney, from which the privity relied on was asserted to have been created. The agreement in question was stated in full in each of the bills. By virtue of the privity thus asserted the decree rendered in favor of the Louisville Banking Company was pleaded as establishing conclusively, by the estoppel arising from the thing adjudged, the irrevocable nature of the contract springing from the Hewitt Act and the want of power to impair it by assessing or collecting the taxes in controversy. The court below decided that the complainants were not privies to the decision in the case of the Louisville Banking Company, because there was such a difference between the business of a banking company proper and that of a trust company that neither the commissioners of the sinking funds nor the city attorney of the city of Louisville had lawful power to agree that the liability of the trust companies to taxation should abide the result of the case brought by the Louisville Banking Company to test the right to tax it contrary to the contract which it was charged the Hewitt Act had embodied. Because of the want of privity held not to exist, for the reason just stated, the court below decided that the plea of the thing adjudged was untenable. On the merits of the case, the court below held that, as each of the complainants had been chartered after the year 1856, subsequent to an act adopted by the Kentucky legislature in that year, reserving the right to repeal, alter or amend all charters thereafter granted, there was not an irrevocable contract, and, hence, that the levy of the taxes complained of did not impair contract obligations. For these reasons the court sustained demurrers to each of the bills, and dismissed them. 88 Fed. Rep. 407.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, Mr. Frank Chinn, Mr. James P. Helm and *Mr. John W. Rodman* for the banks.

MR. JUSTICE PECKHAM, after making the above statement, delivered the opinion of the court.

It is unnecessary to determine whether the distinction between the business of a bank and that of a trust company was such as to cause it to be illegal to have agreed that the liability of the trust companies to taxation contrary to the Hewitt Act should abide the result of the controversy as to the Louisville Banking Company, since we have just decided in *Samuel H. Stone, Auditor, et al.*, v. *Bank of Commerce*, No. 362, *ante*, 412, that, irrespective of any distinction which might exist between the business of a bank *eo nomine* and that of a trust company, the commissioners of the sinking fund and the city attorney were without power to have made the agreement upon which the complainants relied in order to establish that they were privies to the decision in favor of the Louisville Banking Company. The plea of the thing adjudged depending upon the existence of privity being thus disposed of, there remains only to consider the alleged existence of an irrevocable contract arising from the Hewitt Act. That no such contract arose from that act as to corporations chartered after 1856, or whose charters were extended subsequent to that year, was decided in *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636. Indeed, the opinion in that case and the opinion announced in *Stone* v. *Bank of Commerce*, *supra*, are decisive against the appellants, who were complainants below, as to every issue which arises for decision on these records, and the decrees below rendered are therefore

Affirmed.

THIRD NATIONAL BANK OF LOUISVILLE *v.* STONE, Auditor.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

No. 404. Argued February 28, March 2, 1899. — Decided May 15, 1899.

The assertion in this case of an irrevocable contract with the State touching the taxation of the plaintiff, arising from the Hewitt Act, is disposed of by the opinion of this court in *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636.

The taxes which it was sought to enjoin in this suit were imposed upon the franchises and property of the bank, and not upon the shares of stock in the names of the shareholders, and were therefore illegal because in violation of the act of Congress.

THE statement of the case will be found in the opinion of the court.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the banks.

MR. JUSTICE WHITE delivered the opinion of the court.

The appellant, a banking corporation organized under the National Banking act, and whose charter was renewed on August 6, 1894, for a period of twenty years, filed its bill to enjoin the assessment of certain taxes for the years 1895, 1896 and 1897. The grounds of relief set out in the original and amended bills were substantially as follows: First. That the corporation had accepted the terms of an act of the general assembly of the State of Kentucky, denominated as the Hewitt Act, from which it resulted that there was an irrevocable contract protecting the bank from all municipal taxation and from all state taxation except such as was imposed by the Hewitt Act. The provisions of the Hewitt Act thus relied on were fully stated in *Citizens' Savings Bank of Owensboro* v.

Owensboro, 173 U. S. 636. Moreover, it was alleged that on the 18th day of June, 1894, the city of Louisville, having theretofore attempted to collect from the bank certain license taxes, contrary to the terms and conditions of the contract created by the Hewitt Act, the bank commenced suit to prohibit the collection of said taxes, and that these proceedings culminated in a decree of the Court of Appeals of the State of Kentucky prohibiting the collection of the taxes in question, on the ground that the bank had an irrevocable contract, arising from the Hewitt Act, which could not be impaired. The bill specifically alleged that the decree thus rendered by the Court of Appeals of the State of Kentucky constituted the thing adjudged, and, by the presumption arising therefrom, established beyond power of contradiction the existence of the irrevocable contract right. In addition, the bill alleged that the taxes in question were illegal, because they were imposed on the franchise and property of the bank in violation of the act of Congress with reference to the taxation of national banks by the respective States. Rev. Stat. § 5219. The taxes were, moreover, averred to be in violation of the act of Congress, because they were discriminatory, and, in addition, were illegal, because they were, in certain designated respects, repugnant to the constitution and laws of the State of Kentucky.

An opinion was filed by the court holding that as well in this case as in another case considered at the same time relating to the taxes for the years 1893 and 1894, demurrers to the bills should be overruled and motions for preliminary injunctions granted. 88 Fed. Rep. 990. The record, however, establishes that, subsequently, on the attention of the court being directed to the fact that the term of the original charter of complainant had expired in the interval between the levy of taxes for the years 1894 and 1895, (the charter having been renewed and extended on August 6, 1894,) the court entered a decree in the case at bar sustaining demurrers to the original and amended bills and dismissing the suit. From the decree so made this appeal was taken.

The assertion of an irrevocable contract arising from the

Hewitt Act is disposed of by the opinion in *Citizens' Savings Bank* v. *Owensboro*. The contention that the presumption of the thing adjudged takes this case out of the ruling in that case, is without foundation, because the suit brought to prohibit the collection of the taxes and in which the judgment relied on was rendered related to taxes for years prior to the expiration of the charter and before the same was renewed. Indeed, the suit wherein the judgment relied upon as constituting *res judicata* was rendered was commenced before the expiration of the original charter. Manifestly, as decided by the court below, a decree establishing the existence of an irrevocable contract, exempting or limiting the bank from taxation for one charter term, is not the thing adjudged as to whether the bank was subject to taxation during a new period of existence derived from a renewal of its original charter life, for, however persuasive the reasons supporting the conclusion that the corporation could not be taxed during its original charter, it was obviously impossible to have decided that the same rule applied to an extension, which only commenced after the initiation of the suit, wherein was rendered the decree relied on as constituting *res judicata*. A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen. For these self-evident reasons, in *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, where a plea of *res judicata* as to a contract right of exemption was maintained, after the renewal of a charter, the court eliminated from consideration all the judgments which had been rendered prior to the period when the amended charter took effect.

These considerations would render it necessary to affirm the judgment but for the fact that the taxes which it was sought to enjoin were imposed upon the franchises and property of the bank and not upon the shares of stock in the names of the shareholders. It follows therefore that they were illegal, because in violation of the act of Congress. *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664.

The decree below must therefore be reversed and the case be remanded for further proceedings in conformity to this opinion, and it is so ordered.

LOUISVILLE *v.* THIRD NATIONAL BANK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

No. 364. Argued February 28, March 2, 1899. — Decided May 15, 1899.

Third National Bank of Louisville v. *Stone, Auditor*, *ante*, 432, followed in holding that taxes like those here in question are illegal, because levied upon the property and franchise of the bank, and not upon the shares of stock in the names of the shareholders.

THE case is stated in the opinion of the court.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the bank.

MR. JUSTICE WHITE delivered the opinion of the court.

The appellee, the Third National Bank, filed its bill to enjoin the collection of certain taxes, relying upon grounds in all respects like unto those alleged in case No. 404, *ante*, p. 432. There was, however, this difference between the facts of the latter case and those arising on this record: In this case the taxes sought to be enjoined were levied prior to the renewal of the charter of the bank. Because of this difference the court below concluded that the want of power to assess and levy was conclusively established by the presumption of the thing adjudged arising from the decree of the Court of Appeals of Kentucky, to which we have referred in case No. 404. We need not, however, consider the question of *res judicata* upon which the court below based its conclusion, as we have in case No. 404, just announced, held entirely without reference to the plea of *res judicata*, that taxes in form exactly like those here in question were illegal because levied upon the property and franchise of the bank, and not upon the shares of stock in the names of the shareholders. It follows, therefore, that the decree below which restrained the collection of the taxes was correct, and it is therefore

Affirmed.

LOUISVILLE *v.* CITIZENS' NATIONAL BANK.

CITIZENS' NATIONAL BANK *v.* STONE, Auditor.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Nos. 365, 405. Argued February 28, March 2, 1899. — Decided May 15, 1899.

Third National Bank of Louisville v. *Stone, Auditor, ante,* 432, and *Louisville* v. *Third National Bank, ante,* 435, followed.

THE case is stated in the opinion.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, Mr. Frank Chinn, Mr. James P. Helm and *Mr. John W. Rodman* for the bank.

MR. JUSTICE WHITE delivered the opinion of the court.

The Citizens' National Bank was organized on the 8th day of August, 1874, its charter being stipulated to endure for a period of twenty years. On April 1, 1894, the charter was renewed and extended for twenty years. The bank in these two cases filed its bills to enjoin the collection of certain taxes on the ground that by the effect of a statute of the State of Kentucky, usually referred to as the Hewitt Act, an irrevocable contract had been entered into between the State and the bank, from which it resulted that the taxes complained of could not be levied without impairing the obligations of such contract. It was moreover averred that the existence of this contract had been judicially determined in a suit between the Third National Bank and the city of Louisville, to which suit the Citizens' National Bank, although not a party, was a privy because of certain agreements alleged to have been made between the city of Louisville and the bank at the time the suit was brought by the Third National Bank. In consequence of this fact it was alleged that the existence of the contract between the Citizens' National Bank and the State had been

judicially determined, and the decree to that effect was pleaded as *res judicata.* In addition, the taxes in question were alleged to be illegal, because imposed upon the franchise and property of the bank, and because they were discriminatory, and they were averred besides to be illegal under the state constitution and laws. The lower court held that the plea of *res judicata* established an irrevocable contract as to the taxes for years prior to the date of the extended charter, but that the thing adjudged did not conclude that there was an irrevocable contract as to taxes imposed after the date of the extension of the charter, because such taxes were not and could not have been in controversy in the cause in which the prior judgment had been rendered. Upon these grounds, in the second case, that is No. 405, it decided that the complainant was without right to relief, and in the first case, No. 365, that it was entitled to the relief sought.

These two cases are in all material respects identical with the cases of *The Third National Bank of Louisville* v. *Samuel H. Stone, Auditor of Public Accounts, et al., ante,* 432; and *City of Louisville* v. *The Third National Bank, ante,* 435, which have been just decided. For the reasons given in the decisions rendered in those cases, it is ordered that the decree below rendered in No. 365 be, and the same is hereby, affirmed, and that rendered in No. 405 be, and the same is hereby, reversed, and that the last-mentioned case (viz., No. 405) be remanded to the court below with directions to take such further proceedings as may be in conformity to this opinion, and it is

So ordered.

FIRST NATIONAL BANK OF LOUISVILLE *v.* LOUISVILLE.

SAME *v.* STONE.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Nos. 635, 634. Argued February 28, March 2, 1899. — Decided May 15, 1899.

The decision of the court below that taxes imposed upon the franchise or intangible property of a national bank may be regarded as the equivalent of a tax on the shares of stock in the names of the shareholders, and hence did not violate the act of Congress in that respect, was erroneous and is reversed.

THE case is stated in the opinion.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the banks.

MR. JUSTICE WHITE delivered the opinion of the court.

In these two cases the appellant filed its bills to enjoin the assessment and collection of certain taxes. The grounds upon which the prayer for relief in each case was rested were substantially as follows:

First. That the taxes in question were levied upon the franchise and property of the bank, and not upon the shares of stock in the names of the shareholders, and were therefore illegal; second, that the taxes were discriminatory, because, as a consequence of the exemption of certain state banks from taxation by special contract, the property of the bank was taxed at a higher rate than other moneyed capital, in violation of the act of Congress; and, third, that the taxes were illegal, because not in conformity to the state constitution and certain provisions of the state laws.

The court below decided that, although the taxes were im-

posed or contemplated to be assessed on the franchise or intangible property of the bank, nevertheless they were the equivalent of a tax on the shares of stock in the names of the shareholders, and hence did not violate the act of Congress. It moreover held that the remaining grounds were without merit. 88 Fed. Rep. 409.

The law under which the taxes in question were levied is the same one which was considered in *Owensboro National Bank, Plaintiff in Error*, v. *The City of Owensboro and A. M. C. Simmons*, 173 U. S. 664. The theory of equivalency upon which the court below decreed the taxes to be legal was in that case fully examined, and held to be unsound.

It follows that the decrees below rendered in these cases were erroneous. It is therefore ordered that said decrees be

Reversed, and the cases remanded to the lower court with directions for such further proceedings as may be in conformity with this opinion.

LOUISVILLE *v.* BANK OF LOUISVILLE.

STONE, Auditor, *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Nos. 359, 358. Argued February 28, March 2, 1899. — Decided May 15, 1899.

Stone v. *Bank of Commerce*, 174 U. S. 412, affirmed and applied to the point that the agreement of the commissioners of the sinking fund of Louisville and the attorney of the city with certain banks, trust companies, etc., including the Bank of Louisville, that the rights of those institutions should abide the result of test suits to be brought, was *dehors* the power of the commissioners of the sinking fund and the city attorney, and that the decree in the test suit in question did not constitute *res judicata* as to those not actually parties to the record.

Citizens' Savings Bank of Owensboro v. *Owensboro*, 173 U. S. 636, also affirmed and applied.

On questions of exemption from taxation or limitations on the taxing power, asserted to arise from statutory contracts, doubts arising must be resolved against the claim of exemption.

Statement of the Case.

THE Bank of Louisville in these two cases filed its bills to enjoin the collection of certain taxes. The matters to which the bill in the first case (No. 359) related were certain franchise taxes for the years 1893 and 1894, the assessment and certification of valuation whereof had been made prior to the filing of the bill. Those covered by the bill in the second case (No. 358) were, generally speaking, like those embraced in the preceding suit, but were for different years — that is, for 1895, 1896 and 1897, and by an amendment the taxes of 1898 were also included. These taxes, however, had not been certified at the time the bill was filed, and the relief contemplated was the enjoining of the valuation of the franchise and the certification of the same for the purposes of taxation, as well as the subsequent collection of the taxes to be levied thereon. Omitting reference to the averments distinctly relating to the jurisdiction in equity, the case made by the bills was this:

It was alleged that the bank was chartered on February 2, 1833, to endure until January 1, 1853; that pursuant to an act approved February 16, 1838, the provisions of which had been complied with, the charter existence was extended for nine years; that by an act of February 15, 1858, duly accepted by the bank, its charter privileges were continued in full force for twenty years from the 1st of January, 1863; and finally that by an act of May 1, 1880, which the bank had duly accepted, its charter was extended for twenty years from January 1, 1883. It was alleged that by the sixth section of the original charter it was provided, among other things, that the cashier of the bank "shall on the first day of July, 1834, and on the same day annually thereafter, pay unto the treasurer of the State twenty-five cents on each share held by the stockholders in said bank, which shall be in full of all tax or bonus on said bank; provided, that the legislature may increase or reduce the same; but at no time shall the tax imposed on said stock exceed fifty cents on each share held in said bank." The tax, the bills admitted, by an act approved February 12, 1836, had been increased to fifty cents a share.

Statement of the Case.

In general language, it was averred that by certain decisions rendered by the courts of Kentucky in the years 1838, 1869 and 1888, it was held that similar language to that contained in the charter of complainant constituted a contract preventing a higher rate of taxation than that provided for in the charter, and that from all or some of these decisions it resulted that the extension of an original charter, under the law of Kentucky, carried with it all the rights and privileges, including the limit of taxation, contained in the original charter. No decision, however, prior to 1880, by the Kentucky Court of Appeals, was referred to, holding that the mere grant of a charter, or an extension thereof, was not subject to repeal, alteration or amendment, if such power was reserved, by a general law, in force when the charter was enacted or the extension was granted. There was no averment that the complainant was either a party or a privy to the suits in which the decisions referred to had been rendered.

In both bills it was averred at length that the general assembly of the State of Kentucky had enacted the statute known as the Hewitt Act, and that the bank had accepted its provisions. This act and its acceptance, it was asserted, constituted an irrevocable contract, protected from impairment by the Constitution of the United States, thus securing the bank against any form of taxation other than that provided in the Hewitt Act. It was in both bills then declared that in 1894 the city of Louisville, asserting a right to collect taxes from the bank, in violation of the contract embodied in the Hewitt Act, for the purpose of testing the right of the city to do so, an agreement was entered into between the commissioners of the sinking fund, the city of Louisville through the city attorney, and the attorneys of the complainant and of other banks and trust companies, by which representative suits were to be brought, and it was agreed that the liability of the complainant to any other taxation than that imposed by the Hewitt Act should abide the result of the test suits in question; that in compliance with this agreement a suit was brought by the Bank of Kentucky, which like the complainant had been originally chartered before 1856, in which last-

named year an act had been passed in Kentucky reserving the right to repeal, alter or amend all charters subsequently granted, subject to certain exceptions provided expressly in the act of 1856, and that this suit had culminated in a final decree by the Court of Appeals of Kentucky holding that the Hewitt Act was an irrevocable contract, and that the banks which had accepted it were not liable to any other taxation than that therein specified. Averring that the suit brought by the Bank of Kentucky was the test suit contemplated by the agreement, as determining the liability of the complainant to other taxation than that imposed by the Hewitt Act, the decree in the suit of the Bank of Kentucky was pleaded as *res judicata*. In addition, the bills asserted that if the Hewitt Act was held by this court not to constitute an irrevocable contract, then the complainant was entitled to be restored to its rights under its charter as extended, and was consequently not subject to the particular taxes, the assessing and collection of which it was the object of the bills to prevent.

The court below held that the complainant, by virtue of the agreement referred to, was a privy to the decree rendered by the Court of Appeals of the State of Kentucky in favor of the Bank of Kentucky in the test case in question, and hence decided that the plea of *res judicata* was well taken. From its decrees enforcing these conclusions the appeals in both these cases were taken.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the bank.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The unsoundness of the plea of the thing adjudged, upon which the lower court rested its decision, results from the opinion announced in *Stone* v. *Bank of Commerce*, *ante*, 412, and *Louisville* v. *Same*, *ante*, 428. It was there held that the

agreement of the commissioners of the sinking fund of the city of Louisville and the attorney of the city with certain banks, trust companies, etc., including the complainant bank, that the rights of those institutions should abide the result of test suits to be brought, was *dehors* the power of the commissioners of the sinking fund and the city attorney, and therefore that the decree in the test suit in question did not constitute *res judicata* as to those not actually parties to the record.

The want of foundation for the assertion that the Hewitt Act created an irrevocable contract between the complainants and the city is also disposed of by the decision in *Citizens' Savings Bank of Owensboro* v. *Owensboro.* There is no ground for distinguishing this case from the one last referred to. True it is that the original charter of the complainant differs somewhat from the charter of the Citizens' Savings Bank of Owensboro, inasmuch as the charter of the Citizens' Savings Bank contained simply a limitation of taxation to a fixed rate, whilst the charter now in question, although establishing a stated rate, provided that the named rate might be reduced or increased, but *should not be increased beyond a maximum sum.* This limit as to the power to increase, it has been argued, took the case out of the reach of the act of 1856, since it was a plain expression of the legislative intent that there should be no increase beyond the maximum stated.

At the time the charter was extended, in 1880, the act of 1836 had increased the limit of taxation, fixed by the original charter, to the maximum therein allowed of fifty cents on each share. Conceding, *arguendo*, that the charter, as thus extended, carried with it, into the new period, the limitation of taxation fixed by virtue of the original charter and by the act of 1836 increasing the sum to fifty cents on each share, nevertheless the case is covered by the decision in the Citizens' Savings Bank of Owensboro, *supra.* There is nothing in the extending act expressing the plain intent of the legislature that the charter as extended should not be subject to the repealing power reserved by the act of 1856. The act of

extension, therefore, was not taken out of the general rule arising from the act of 1856, that is to say, it was not embraced in the exception mentioned in that act, saving from the power to repeal, alter or amend "all charters and grants of or to corporations or amendments thereof" when "the contrary intent be therein plainly expressed." No such intent being plainly expressed in the extending act, it follows that the charter as extended was subject to repeal. It is impossible, in consonance with reason, to conceive of an unlimited irrepealable contract right when there is no unlimited irrepealable contract from which the right can be derived. And yet to such conclusion does the reasoning necessarily conduce which asserts that a repealable charter gave rise to an irrepealable contract right. Granting that the extending act in substance amounted to a reënactment in so many words of the provision found in the original charter, such provision as reënacted became but a part of a whole contract which was subject to repeal. The right to repeal, embracing the whole, covered also necessarily the provisions found in the whole. The limitation of taxation in the original charter was during the life of the corporation. If carried forward by the amendment it was only for the new period, that is, during the extended charter. But for all this extended period the charter was subject to repeal, at the will of the legislature, and the power to terminate the charter involved the correlative right of ending those stipulations which were only to last during the charter. The argument that, although the power to repeal the charter was reserved, the power to alter the taxation, without repealing the charter, did not arise, is but a form of stating the proposition which we have already noticed, and which amounts to the assertion that the lesser is not contained in the greater power. We must construe the extending act as a whole, especially in view of the origin and implied import of acts reserving the power to repeal, alter or amend, as fully stated in *Citizens' Savings Bank of Owensboro* v. *Owensboro*. We think that the extending act was subject to the reserved power of repeal, free from limitations inconsistent with the exercise of the right. The elementary general rule is that on

questions of exemption from taxation or limitations on the taxing power, asserted to arise from statutory contracts, doubts arising must be resolved against the claim of exemption. We cannot imply from the mere presence in the extended charter of the limitation of taxation, found in the original charter, a restraint on the power to repeal, alter or amend, when such restraint does not flow from the provisions of the extending act taken as a whole. It results from the fact that the extended charter was subject to repeal, that the complainant had no irrevocable contract limiting the power of the State to tax. Having no such right, it, of course, cannot assert that it must, if the Hewitt Act was not an irrepealable contract, be restored to the contract rights existing at the date of the enactment of the Hewitt Act. The non-existence of the prior right precludes the thought that a restoration could be possible.

From the foregoing reasons it follows that the decrees below rendered were erroneous, and they must be and are

Reversed, and the cases remanded with directions to dismiss the bills, and it is so ordered.

MR. JUSTICE HARLAN dissented on the ground that there was privity, and therefore *res judicata.*